SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,
PETITIONER,

VS.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT, IOWA-WISCONSIN BRIDGE COMPANY.

FRED A. ONTJES,
WM. C. GREEN,
Counsel for said Respondent.

INDEX.

Subject Index.

Table of Cases.

Statutes and References.

FOREWORD.

In answer to page one of the petition entitled "Foreword," respondent states that the claimed decision of the Superior Court of New Castle County, Delaware, is not a part of this record. That opinion was not filed until after the hearing on permanent writ of injunction in the United States District Court and submission thereof, and this cause does not involve the construction of any Delaware statutes or any decisions construing such statutes, but on the contrary involves the enforcement of the judgments and orders of the United States District Court for the Northern District of Iowa and of the Eighth Circuit Court of Appeals, which is governed by the decisions of the Iowa Supreme Court and of the federal courts.

The case of *American Surety Company* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, cited by petitioner, involved the question of granting writ of certiorari to the Supreme Court of Idaho on decision rendered by it reversing an order vacating a judgment against the surety company. In addition to applying for certiorari the surety company made another motion in the state court to correct, amend and vacate the judgment involved in the petition, and also took a direct appeal from that judgment to the Supreme Court of Idaho. The decision on the petition was evidently withheld because if the last two steps mentioned resulted favorably to the surety company the whole matter would be disposed of without decision on the petition.

Such is not the situation in the instant case. A decision by the Delaware Supreme Court in that case involving one of the suits enjoined, whether favorable or unfavorable to the petitioner, could have no particular bearing on this petition. No occasion for delay exists, and it is to be presumed that if certiorari is denied that the petitioner will comply with the permanent writ of injunction and dismiss said Delaware case and satisfy any judgment rendered therein, and if it does not that the Delaware Supreme Court will follow the decision in this case and reverse the decision of the Superior Court.

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OPINIONS BELOW.

The original decisions of the district court (F.R. *1, pp. 156 to 204 and 208 to 211 and 411 to 413), are reported in 19 Fed. Supp. 127, and the opinion of the

*1. Whenever in this brief reference is made to the original or first record in this cause on the former petition in this court for certiorari by Phoenix Finance Corporation (No. 438, October Term, 1938), the letters "F R" will be used in the reference, and the letters "F.R. Supp." will be used in the reference to the supplemental volume thereof; and whenever reference is made to the record on supplemental and ancillary proceedings, the letter "R" will be used in the reference.

Circuit Court of Appeals for the Eighth Circuit on the first appeal (F.R. Vol. VI, pp. 1689 to 1709), is reported in 98 Fed. (2) 416. On permanent writ of injunction the district court's findings of fact and conclusions of law appear (R. pp. 700 to 717), opinion of the district court (R. pp. 717 to 719), and final decree on permanent injunction appears (R. pp. 719 to 720). The opinion and decree of the Circuit Court of Appeals on permanent writ of injunction appears in the record at pages 767 to 788, and is reported in 115 Fed. (2) 1.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 26, 1940 (R. pp. 787-788). The petition for writ of certiorari was filed on the 13th day of December, 1940. The jurisdiction of this court is sought to be invoked under sub-paragraph 2, of Section 240 of the Federal Judicial Code as amended (28 U.S.C.A., sec. 247).

QUESTIONS PRESENTED.

(1) Whether Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings and decree entered therein.

(2) Whether the validity of the bonds and the consideration received for them were adjudicated in the foreclosure case, that is whether the decree in the foreclosure case affirmed by the Circuit Court of Appeals is *res judicata* of the controversies involved in the supplemental and ancillary proceedings.

(3) Whether the injunction is a violation of Section 265 of the Judicial Code or of the Fifth Amendment to the Constitution.

(4) Whether the burden was upon respondent to show that the decree in the foreclosure was a "right" one and not obtained by fraud.

STATEMENT OF THE CASE.

Because of inaccuracies, misstatements and omissions in the statement submitted by petitioner, it is necessary for the respondent to submit a brief statement of the case.

This case came to the Circuit Court of Appeals for the Eighth Circuit a second time, on an appeal from a decree of the District Court for the Northern District of Iowa, entered after hearing on supplemental and ancillary bill, granting permanent writ of injunction to protect the fruits of the prior decrees and orders of the federal courts in this cause and to enforce the same and restraining and enjoining the violation thereof and the commencement and prosecution of harassing, vexatious and annoying litigation.

The Original Proceedings.

The original bill in this case was filed by the First Trust & Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, a resident of Wisconsin, as trustees, versus Iowa-Wisconsin Bridge Company, a Delaware corporation, on August 28, 1933, for the foreclosure of a deed of trust securing an alleged $200,000 bond issue. The action was instituted at the request and instigation of appellant, Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection. (F.R. p. 537; Exhibit 28, H.E.B., F.R. pp. 789-791, especially top p.

790, offered F.R. p. 535; Exhibit B, H.E.B., F.R. bottom p. 794 and top p. 795, offered F.R. p. 537; Exhibits B-1, H.E.B. (403 H.L.B.), B-2, H.E.B. (404 H.L.B.), B-3, B-4, B-5, B-6 and B-7, H.E.B., F.R. pp. 1478-1482; pp. 617, 695, approved as part of narrative statement, F.R. pp. 709, 720-21, 723; Exhibit B-6, on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its predecessor, F.R. 1481; approved as part of narrative statement, F.R. 709, 723.)

The bill alleged jurisdiction based on diversity of citizenship, and alleged a deed of trust in the ordinary form of a mortgage trust deed securing a bond issue of $200,000, making it the duty of the bridge company to pay taxes on the mortgaged property (F.R. p. 31) to pay interest on the bonds, and to pay the bonds as they matured (F.R. p. 29). In case of default for a period of sixty (60) days, it was provided that the trustees "may," and upon the written request of the holders of twenty-five per cent of the bonds then in default "shall" declare the principal of all the bonds due (F.R. p. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this indenture by a suit or suits in equity or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustees * * * shall deem most effectual" (F.R. pp. 37-38) and in addition to Section 13 (F.R. pp. 43-44) of the mortgage or trust deed, quoted from in the first opinion of the Circuit Court of Appeals (98 Fed. (2) 416, at 420), it also provided: "Section 10. The company covenants that (1) in case default shall be made in the payment of any interest on any

bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be, with interest upon the over due principal and/or installments of interest of each such bond at the coupon rate, *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"*The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendency, of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof*; and in case of a sale of the mortgaged property, and of the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive the amount

then remaining due and unpaid upon any and all bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. * * *" (F.R. pp. 41-44.) (Emphasis supplied.)

The bill alleged that all of said bonds were duly made and executed on behalf of the bridge company, duly presented to and authenticated by Bechtel Trust Company (trust company) as in said mortgage deed of trust provided, and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a *good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value.* Said bonds and interest coupons are valid obligations of said Iowa-Wisconsin Bridge Company, and are entitled to the benefit and security of said mortgage deed of trust. The bill further alleged authority of the trustees to sue under the terms of the deed of trust, default and acceleration of due date, and prayed:

That an account be taken of the bonds and interest coupons secured by said mortgage deed of trust *and the amount due on the bonds* for principal and interest or otherwise, * * * that said Iowa-Wisconsin Bridge Company be decreed to pay to complainants the *amount found due on such accounting* * * * within a short day to be fixed by the court, and that in default of payment the mortgaged property be sold * * * to satisfy the amount so found due and costs, and in case of such sale defendant * * * be barred and foreclosed of all equity of redemption * * *; that in event proceeds

of such sale shall not be sufficient to satisfy in full the decree to be rendered in this suit, that these complainants *have a decree* against said Iowa-Wisconsin Bridge Company for the *deficiency*; and prayed for a receiver of all the property of the defendant and for general equitable relief. (F.R. pp. 10-11.) (Emphasis supplied.)

It will be noted that the prayer asks (1) the determination of the amount due on the bonds and coupons, (2) a short day to pay, (3) then strict foreclosure without redemption, (4) deficiency judgment, (5) general equitable relief.

On the same day, August 28, 1933, the complainants moved for the appointment of a receiver as prayed (F.R. 60). On the 25th day of September, 1933, defendant bridge company filed answer (F.R. 60-66) denying complainants were entitled to the relief prayed, denied the validity of the mortgage deed of trust, alleged that there was a good defense to all or part of the bonds, and prayed that the plaintiffs be required to make a complete showing as to the consideration received by the bridge company in each and every instance for the delivery of the bonds, and denied complainants' right to the appointment of a receiver (F.R. 62-66).

Appointment of Receiver.

On September 28, 1933, the court appointed a receiver of all of the property of the bridge company of every kind and took the same into legal custody (F.R. pp. 68-72). The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action.

Intervention.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company, and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated (F.R. pp. 73-83) praying that the complainant's bill be dismissed, the bonds cancelled and the deed of trust set aside and for general equitable relief. He alleged that John A. Thompson and his associates, officers and directors of the Phoenix Finance System, Inc., predecessor of the petitioner, dominated the bridge company, and by the exercise of such domination, fraudulently procured the execution and delivery of the deed of trust and the issuance of the bonds to corporations controlled by them; that all of the bonds and mortgage deed of trust were issued as a part of the fraudulent scheme, plan and conspiracy without consideration, with intent to cheat and defraud the bridge company and its stockholders out of their property; that in pursuance thereof part of the bonds issued were fraudulently obtained by cancelling stock and that the bonds and mortgage were fraudulent, without consideration, invalid and void; that none of the bonds had passed to innocent purchasers for value without notice; that said John A. Thompson and his associates in conspiracy still were in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant corporation would be unavailing (F.R. pp. 73-83; amendment to petition of intervention, F.R. pp. 100 to 102). On December 5, 1933, the court granted the intervention (F.R. pp. 85 to 86). The master and the court found that the bridge company was not making and would not have made a good faith defense to complainant's action had not the interveners intervened (F.R. pp. 160-183).

Phoenix Finance Corporation Made a Party.

On the 5th day of December, 1933, the interveners made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. 83-84, folio 119), and on hearing thereof the court found that complainants' counsel stated in open court that Phoenix Finance Corporation had succeeded Phoenix Finance System, Inc., and was the holder of the bonds involved in the action with the exception of about $10,000 worth of said bonds. The court thereupon granted the motion and ordered that Phoenix Finance System, Inc., and Phoenix Finance Corporation *be made parties plaintiff in the cause, and defendants to the petition of intervention,* and that the clerk issue necessary summons for said purpose (F.R. 86). Subpoena directed to Phoenix Finance Corporation making it a party was duly served on said corporation (F.R. 87-89, folios 126-127). It appeared (F.R. 89).

By order of court the petition of intervention was taken as an answer to the bill (F.R. 100).

Phoenix Finance Corporation filed an answer to the petition of intervention on information and belief denying all the allegations thereof and alleging that it was the *owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosnre and prayed for general equitable relief (emphasis supplied). (F.R. pp. 91-92.) The trustees filed reply to the petition of intervention denying the allegations thereof, etc. (F.R. 102-103).

The trustees filed a resistance to intervener's application for the production of books and papers of Phoenix Finance Corporation (F.R. 92-96 and 96-97). On the

24th of April, 1934, the court entered an order that Phoenix Finance Corporation produce all of its books and records pertaining to the business and affairs of the Iowa-Wisconsin Bridge Company (F.R. 97-98), but such books, records and papers were never produced (F.R. 614-616; bottom 396 to 399).

Other stockholders of the bridge company, residents of Iowa, intervened and adopted the pleadings filed by Kendrick (F.R. 104, 105 and 107).

On the 5th day of December, 1934, counsel for the parties agreeing, the court appointed a special master to hear all of the issues in the cause, to take the evidence and proofs according to law, to examine the questions in issue, and to "report from said evidence his findings of fact and conclusions of law in respect to all issues herein, to report his conclusions as to whether the evidence and pleadings *entitle the complainants or other parties herein to the relief or any part thereof* prayed for in their respective pleadings, etc." (F.R. 107-108).

On the trial before the master the trustees appeared by attorneys selected by the petitioner, Phoenix Finance Corporation, hereinafter called Phoenix, and the Phoenix appeared by attorney W. B. Sloan. (F.R. 531, 537; F.R. 794-795; F.R. 1479-1482.)

The complainants called John A. Thompson, president of complainant, Phoenix, in their main case, who testified as to claimed considerations for the bonds, and who was cross examined on that subject. (F.R. pp. 238-242; F.R. pp. 242 to 545; F.R. pp. 545-556; F.R. pp. 560-561; F.R. pp. 562-564; F.R. pp. 633-637; F.R. pp. 673-675; F.R. pp. 675-678; F.R. bottom p. 675 to p. 685; F.R. pp. 691-692.)

The claimed considerations involved in the case are summarized in the first decision of the Eighth Circuit Court of Appeals (98 Fed. (2) 416, at 424) and are the same as those summarized in that court's opinion on permanent writ of injunction. (*Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Co.*, 115 Fed. (2) 1, at 7.)

A large amount of testimony, depositions and exhibits were offered in evidence, as shown by the five volumes of the first record. At the conclusion of the trial the master stated: "* * * I would like to have the theory of all parties definitely in reference to the consideration, etc." (F.R. p. 693.) Written briefs and arguments were filed. (F.R. p. 693.) The case was finally orally argued before the master on the 25th day of October, 1935, and *submitted in its entirety.* (F.R. 694.)

Petitioner, Phoenix', statement on page five of its petition, "Tacit understanding of all parties and master as to procedure at trial was that there were two stages in the proceedings, viz.: (1) The issue of the validity of the deed of trust, and, if deed of trust was found valid to any extent and foreclosure ordered, (2) The issue as to what bonds were validly entitled to participate in proceeds of sale" is without foundation and directly contrary to the record.

(a) The case was referred in its entirety to the master "To report * * * whether the evidence and pleadings entitled the complainants or other parties herein to the relief or any part thereof prayed for in their respective pleadings, etc." (F.R. 107-108.) (b) Counsel for the parties on oral argument of the cause before the master on October 25, 1935, stated directly that the case was being submitted in its entirety.

Mr. Fowler, counsel for complainants: "There is a question in this case as to whether or not at this particular time the master should recommend that a decree of foreclosure be entered, and the question of which of the bonds are to participate be reserved or taken up at a later date. *I do not suggest for a moment that this testimony will have to be reopened.* * * * And as I said in our opening argument, I think under this record, you can use your own judgment, the master can use his own judgment as to whether he wants to decide this all at this time. * * *"

Mr. Ontjes, counsel for interveners: "Mr. Fowler talks about piece-meal trials. Your Honor, we didn't enter into this trial as any piece-meal proposition. We had no piece-meal ideas in our mind when Mr. Green and I presented our citations in this matter for the taking of these depositions and this evidence. It is our contention that we are trying and submitting this case in its entirety at this time * * *" (F.R. 694-695; 406-408; F.R. 394-413).

Complainants' counsel at that time also stated: "We represent all of the bondholders" (F.R. 695), also see counsel's statement (F.R. 533).

The master on March 18, 1936, filed a comprehensive report (F.R. 115-138), to which all parties excepted. (Trustees' F.R. Supp. 3-14; Phoenix Finance Corporation, F.R. Supp. 14-58; bridge company and interveners, F.R. 148-156.)

After hearing the conclusions of the master were adopted by the court with some modifications and amplified with additional findings.

The court made findings of fact and conclusions of law and entered its decree containing the following statement: "That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000 hereinafter specified," then specifying bonds held by parties other than Phoenix. (*Bechtel Trust Company, et al.* v. *Iowa-Wisconsin Bridge Co., Fayette D. Kendrick, et al., interveners,* 19 Fed. Supp. 127; F.R. 156-204.) Foreclosure was denied, but the receivership was continued for the purpose of impounding the income of the bridge company until the $15,000 of obligations found to be meritorious should be paid (F.R. p. 204).

Petitioner, Phoenix' statement on page five of its petition "No evidence of fraud on part of Phoenix Finance System, Inc. chargeable in any way to Phoenix," is directly contrary to the record.

The court found that the Phoenix Finance Corporation had succeeded the Phoenix Finance System, Inc., and ordered that it be made a party (F.R. p. 86). The evidence identified the interest between Phoenix Finance Corporation and Phoenix Finance System, Inc., as actors in the fraudulent conspiracy, and the succession of the latter by the former.

The court found: that "the Phoenix Finance Corporation at the time of its organization was officered and controlled by the same officers as the Phoenix Finance System, Inc., and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and

proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor" (F.R. 202). And the Circuit Court of Appeals with reference thereto stated: "Inasmuch as the district court found that Phoenix Finance Corporation was in all respects so far as concerns this case the successor of Phoenix Finance System, Inc., and managed by the same officers, both corporations are hereinafter indiscriminately referred to as Phoenix" (F.R. vol. 6, p. 1690, 98 Fed. (2) 416, at 419). *2.

The district court held that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent plan, scheme and conspiracy to acquire ownership of the bridge company's property to the exclusion of the bridge company and its stockholders (F.R. 157). This was affirmed by the Circuit Court of Appeals (98 Fed. (2) 416, at 428).

On December 19, 1937, Phoenix Finance Corporation filed a motion to vacate and expunge and set aside the decree, findings of fact, opinion, etc., on the ground that no diversity of citizenship existed upon which jurisdiction in the case could be based (F.R. 204-205), to which motion the bridge company filed a resistance (F.R. 206-208). The motion was overruled (F.R. 208-211). On January 29, 1937, the trustees filed a motion

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*2. Where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme * * *. It is not necessary that they be in **pari delicto**. It is enough that each was at some time and in some degree a party and an aider of the improper transaction. Fletcher Cyc. of Corp. (Perm. ed.), Vol. 1, Sec. 158, pp. 650-655; **McCandless v. Furland**, 296 U. S. 140, 56 S. Ct. 41; **Irving Trust Co. v. Deutsch** (C.C.A.), 73 Fed. (2) 121, 123; **Jackson v. Smith**, 254 U. S. 586, 41 S. Ct. 200, 65 L. ed. 418.

for dismissal and in the alternative petition for rehearing, division one claiming want of jurisdiction as claimed in Phoenix' prior motion and asking dismissal (division one overruled) (F.R. 411); division two in the alternative petition for rehearing, adopting the petition for rehearing of Phoenix Finance Corporation (F.R. 211-214). On the same day Phoenix Finance Corporation filed petition for rehearing and in the alternative for modification of decree. Both petitions were verified by Phoenix' president, John A. Thompson (F.R. 216-223). In this petition of Phoenix filed after its voluminous exceptions to the master's report had been overruled, it alleged its present assertion of two stages in the proceedings, and that the master received the submission of the case under a misapprehension, and re-asserted its claimed considerations for bonds asserted on the trial and in its exceptions to the master's report (F.R. 216-223), and prayed in the alternative (1) for rehearing; (2) in case denied, then as alternative relief that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action if it so desires; (3) that the decree be so modified as to reinvest petitioner 517 shares of "A" stock surrendered in exchange for bonds; (4) that decree be modified so as to withhold from adjudication the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received (F.R. 223). The bridge company and interveners filed answer and resistance to the petition (F.R. 394-410). There was no misapprehension. The case was submitted in its entirety (F.R. 694-695). The petitions for new trial and for modification of decree were over-

ruled. (Court's opinion, F.R. 411-413; 19 Fed. Supp. 127, at 142.)

The trustees and Phoenix, complainants, appealed from the opinion, findings of fact and final decree and from the court's ruling on the motions to vacate the decree, and from the court's ruling on petitions for rehearing and modification of decree to the Eighth Circuit Court of Appeals. Both the trustees and Phoenix filed assignments of error signed by the same counsel (F.R. 501-528). Phoenix executed the appeal bond as principal and filed it (F.R. 528-529). It was asserted, among other things, in such assignments of error that Phoenix was a proper, necessary and indispensable party, and that after it was joined as a party diversity of citizenship no longer existed because both Phoenix and the defendant bridge company were citizens of Delaware. "That to adjudicate the invalidity of the bonds held by the Phoenix Finance Corporation, which was the principal effect of the decree, said Phoenix Finance Corporation was an indispensable party to the proceedings, and the making of it a party for such purpose and effect destroyed the diversity of citizenship necessary to the maintenance of said suit in said court." (Trustees' assignments 3, 4 and 5, F.R. pp. 502-503; Phoenix' assignments 3, 4, 5 and 6, F.R. 508-509.)

The Circuit Court of Appeals held "Had Phoenix not become a party the court could have proceeded to final judgment, granting or denying foreclosure. It could have decided every issue, including the validity of the trust deed and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record." (F.R. 1694, 98 Fed. (2) 416, at 421.) Phoenix contended that the proceeding was a consolidation of two separate and

distinct suits, one brought by the trustees to foreclose the trust deed and one brought by the bridge company and interveners to cancel the bonds held by the Phoenix; and that jurisdiction as to each controversy must be determined separately. The Circuit Court of Appeals held this contention without merit, and stated:

> "If the controversy between the two Delaware corporations should in any way be considered as a separate controversy, involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the matter had been drawn into the Federal Court under the receivership before Phoenix became a party (citing cases). The court did not err in overruling appellants' attack on the jurisdiction." (F.R. 1694, 98 Fed. (2) 416, at 421.)

It was also asserted in the trustees' and Phoenix' assignments of error that the bridge company received full consideration for the bonds, that the decree was broader than the issues, that Phoenix was entitled to foreclosure for the bonds held by it and that the court erroneously denied petition for rehearing and erred in refusing to modify the decree and to compel the defendant to restore to Phoenix 517 shares of the bridge company stock exchanged for bonds (F.R. pp. 510-528 and pp. 503-507). All such assignments were overruled by the Circuit Court of Appeals and the district court's decree, findings, rulings and orders affirmed. (F.R. 1695-1709, 98 Fed. (2) 416, at 421-429.) Phoenix filed in the United States Supreme Court a petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, which was denied (305 U. S. 650, 676; No. 438, Oct. Term, 1938), in which petition

Phoenix asserted the same claims with respect to jurisdiction as are asserted in the present petition, citing thirty-one of the cases cited in the present petition, Article Three, Section Two, and the Fifth and Tenth Amendments of the Constitution of the United States, and Short on Mortgages, Sections 274 and 497, cited in the present petition. The respondent respectfully asks this Honorable Court to take judicial notice of Phoenix' said petition for writ of certiorari filed in cause No. 438, and of respondent's brief in response thereto.

Supplemental and Ancillary Bill.

On the 18th day of September, 1939, the respondent with leave of court filed a supplemental and ancillary bill against Phoenix in the foreclosure proceeding, reciting the history of the litigation and commencement of suits in the state courts of Delaware by the Phoenix and the recording of a mortgage held fraudulent, alleging that all the matters involved in the cases in Delaware were adjudicated in the foreclosure suit, and that Phoenix was threatening to institute and prosecute further actions against the bridge company upon similar alleged causes of action, and praying (1) for preliminary and permanent injunction restraining Phoenix (a) from further prosecuting the suits already begun, (b) from bringing further actions, and (2) for decree commanding Phoenix to dismiss the suits already begun and to satisfy of record a certain $50,000.00 mortgage involved in the foreclosure suit and to surrender the notes purporting to be secured thereby. (R. 2 to 12 and 13 to 97 and amendment pp. 97 to 100.) On the 18th day of September, 1939, respondent filed motion for preliminary injunction, which was by order set for hearing for the 28th day of September, 1939 (R. 101-106). Phoenix filed resistance (R. 112-

118). After hearing on September 28, 1939, the court on the 7th day of October, 1939, granted preliminary writ of injunction. (R. 118-141; especially 132 and p. 145.)

The answer of the Phoenix denies that the matters involved in the Delaware action were adjudicated in the foreclosure suit. Parts of the answer were upon motion of respondent stricken, and the introduction of testimony contradicting the findings and decree in the foreclosure proceeding was denied. (R. 56-176; motion, 167-171; order striking parts of answer, R. 171-172; evidence, R. 272-293.)

Petitioner, Phoenix, states on page 26 of its present brief: "The first affirmative step by Phoenix Finance Corporation was to petition for rehearing after the decree. This was refused because of a mistake of the District Court induced by the deliberate misrepresentation by counsel for the intervener, Kendrick, and other fraudulent tactics on the part of said counsel, his associate, and one of the interveners." This statement is without foundation in the record and the citations of petitioner therefor are only to a portion of its answer stricken and to rulings of the court that certain depositions be not taken and to an offer of proof in contravention of the record. In that part of the answer to which petitioner refers, which was stricken, it was alleged:

"That in support of the petition for rehearing, counsel for Phoenix submitted affidavits of witnesses and that it endeavored to procure affidavits from other witnesses to substantiate the allegations of the petition for rehearing, and that on account of alleged representations of counsel for interveners and an intervener, it was unable to obtain them" (R. 166-167).

The allegations in said paragraph 44 of the answer show on their face that the pretended affidavits or evidence could have been only cumulative in any event. That such a course of procedure is wholly inadmissible under the settled rule of *res judicata*, is held in *So. Pac. R. Co.* v. *U. S.* (168 U. S. 1, 18 S. Ct. 18, at 33). The allegations are mere opinions and conclusion, incompetent, irrelevant and immaterial. There is no allegation as to what it is claimed the so-called "other witnesses" (not named) know or claimed to know with respect to the facts in this case, nor what it is claimed they would have asserted in such affidavits, or what they would testify to, nor that any of them had any connection with or to do with any of the matters involved in this case, or knowledge thereof. The record shows that the persons who had to do with the various transactions involved in this case were called as witnesses on depositions, or as witnesses at the trial, and nothing is alleged as to what it is claimed any of the so-called "other witnesses" would have made affidavit to not contained in evidence on the trial or in Phoenix' petition for rehearing and affidavits attached thereto. Phoenix attached to its petition for rehearing of January, 1937, the affidavits of its then counsel and thirty-six purported affidavits of stockholders, former directors and others (F.R. pp. 216-391), and if there had been any interference with its procurement of affidavits there is no question but that the then counsel for Phoenix would have learned of that while they were gathering the numerous alleged affidavits presented, and would have asserted it in its petition for rehearing and affidavits in support thereof. The assertion in said paragraph 44 was made for the first time in 1939 when Phoenix was called upon to obey the decrees and orders of the trial court and of this court, and appearing by counsel

from Delaware. Furthermore, if the alleged representations had been made, this record is replete with evidence that they would have been true. The trial court and this court found John A. Thompson to be guilty of conspiracy and it would have been perfectly proper for interveners' counsel, if consulted, to have advised persons to be careful not to make false affidavits." (Also see answer and resistance to petition for rehearing and modification of decree and ruling thereon and court's opinion, F.R. 394 to 413, and motion to strike and court's ruling thereon, R. 170-172).

On the 11th day of March, 1940, trial was had on the supplemental and ancillary bill and answer thereto (F.R. 257-239). The court was asked to take judicial notice of all pleadings filed in the case, and all the depositions taken, and all the evidence taken, and the transcripts of such evidence, and of the master's report, and of the exceptions filed to such report, and the opinion, order and decree of the court made with respect to the exceptions to the master's report, and the final decree in the cause, the petition for rehearing filed by Phoenix, the supplemental opinion and order of the court with respect thereto, and without exception to take judicial notice of all records, papers and files in the cause, and all of them were offered in evidence, including the opinion of the Circuit Court of Appeals, reported in 98 Fed. (2) 416, and that court's mandate (R. 260-261). And certified exemplified copies of the summons and declarations in the Delaware cases, and of the mortgage covered by the permanent writ of injunction were offered in evidence (R. 262 to 272).

The court found that Phoenix for the purpose of attempting to invalidate and nullify the prior lawful decree and orders of the court and for the purpose of depriving

the respondent of the fruits and advantages of said adjudications and for the purpose of harassing, vexing and annoying respondent, had commenced and was prosecuting in the State of Delaware various actions involving the same matters fully and finally determined by the prior adjudications of the federal court and had in contempt of court filed of record a $50,000 mortgage held fraudulent and invalid by the court's prior decree (F.R. 191-192).

The court found that all the ultimate facts and issues involved in and presented in each of the actions pending in Delaware mentioned in the opinion of the Circuit Court of Appeals, were within the issues involved and fully considered and determined by the court in its original decree and order denying petition for rehearing and modification of decree, affirmed by the Circuit Court of Appeals (R. 710-711), and found that by the recording of the alleged $50,000 mortgage Phoenix had wrongfully cast a cloud upon the title of the Iowa-Wisconsin Bridge Company to its property, and had attempted to render null and void that portion of the findings and decree and order of the court finally determining the invalidity of said mortgage (R. 712-713). Complete *findings of fact* and conclusions of law of the court appear (R. 700-717). The trial court's opinion which furnishes a complete answer to Phoenix' petition appears (R. 717-719). The court's decree granted the permanent prohibitory and mandatory injunction prayed (R. 719-722). An appeal having been taken to the Circuit Court of Appeals for the Eighth Circuit, that court on October 26, 1940, unanimously affirmed the *findings of fact* and conclusions of law and decree of the district court on its merits (R. 767-788 and R. 831. 115 Fed. (2) 1).

The opinion of the Circuit Court of Appeals clearly summarizes the issues involved in the supplemental and ancillary proceedings and the facts and the identity of the matters involved in those proceedings with those involved in the foreclosure suit.

In the interest of brevity, the portion of the opinion of the court below containing this summary, with appropriate record references, is printed as an appendix hereto (*infra*, pp. 56-57).

ARGUMENT.

Summary of Argument.

Point One. Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings, decree and orders entered therein.

Point Two. The validity of the bonds and the considerations received for them were adjudicated in the foreclosure case, and the decree in that case is affirmed by the Eighth Circuit Court of Appeals, is *res adjudicata* of the controversies involved in the supplemental and ancillary proceedings.

Point Three. The injunction is not a violation of Section 265 of the Judicial Code or of the Fifth Amendment to the Constitution.

Point Four. The burden was not upon the respondent to show that the decree in the foreclosure case was a "right" one and not obtained by fraud.

POINT ONE.

Phoenix was such a party to the foreclosure proceeding as that it is bound by the findings, decree and orders entered therein.

The argument on this point answers petitioner's argument on its points 1 and 2, brief pp. 30-38.

On the first appeal in this case (*First Trust & Savings Bank, et al.* v. *Iowa-Wisconsin Bridge Company, et al.*, 98 Fed. (2) 416, at 421; F.R., Vol. VI, pp. 1689, at 1694), the court held that Phoenix was represented by the trustees and held: "It could have decided every issue, including the invalidity of the trust deed and the amount of the debt secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record." It also held that Phoenix was an ancillary party, stating: "Furthermore if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceeding, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party." Phoenix' petition for writ of certiorari was denied. (305 U. S. 650, No. 438, October Term, 1938, under title Phoenix Finance Corporation vs. Iowa-Wisconsin Bridge Company, *et al.*, rehearing denied, 305 U. S. 676.) Thereupon the question of jurisdiction became forever closed and *res judicata*, and not subject to be again presented by Phoenix.

Des Moines Navigation & Railroad Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Dowell v. *Applegate*, 152 U. S. 327.
Davis v. *Davis*, 305 U. S. 32.
Stoll v. *Gottlieb*, 305 U. S. 165.

The original suit was instituted at the request and instigation of petitioner, Phoenix, and carried on at its expense and under its direction by attorneys of its selection, as is more fully set out in the statement of the case, page 3, *supra.*

Phoenix filed exceptions to the master's report (F.R. Supp. 14). The trustees in their petition for rehearing, which was verified by Thompson of Phoenix, adopted the petition for rehearing of Phoenix (F.R. 214). The trustees and Phoenix appealed to the Circuit Court of Appeals and filed brief and reply brief. Phoenix petitioned this court for writ of certiorari, which was denied.

In *Stoddard* v. *Thompson, et al.,* 31 Iowa 80, at 82, the court said:

> "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein."

See also *Schroeder* v. *State Bank,* 144 Iowa 42, 121 N. W. 505.

That the trustees were the agents and representatives of Phoenix also appears from the trust deed by Section 13 (F.R. 33-34), quoted in the opinion of the Circuit Court of Appeals (98 Fed. (2) 416, at 420), and by Section 10, which is set out in the statement of the case at page 4, *supra.*

In the case of *McPherson* v. *Commercial Building & Loan Co.,* 206 Iowa 562, 218 N. W. 306, the question as to the powers of a trustee was passed upon. The court, in discussing the relationship between a trustee, occupying position similar to that of the trustees in this case, and the bondholders, said:

"In the deed of trust set forth in the petition, the trustee was the pledgee of the securities, and was the proper representative of all the bondholders, with full power both under the trust deed and under the statute. Sections 12364-12371, Code 1924. Plaintiff's bond carried the written attestation of the trustee. *There was no lack of privity as between the holder of the bond and such trustee.*" (Emphasis supplied.)

Also see: Section 10968 of the Code of Iowa of 1935. *3.

In the instant case the claimed considerations involved in the Delaware actions and of the mortgage held fraudulent were all put forward as claimed considerations for the bonds and were all fully investigated to the minutest detail, as shown by the opinion of the Circuit Court of Appeals in the first case, 98 Fed. (2) 416, at 421-429.

The case of *Mackay* v. *Randolph Macon Coal Co.* (8 C.C.A. 1910), 178 Fed. 881, cited by petitioner, involved a question of merger, not of *res judicata,* and was decided under the earlier equity rules, which were amended before the original trial of the present case, and that case is not an authority for the proposition for which it is cited by petitioner.

In *Lane* v. *Equitable Trust Co. of N. Y.* (Nov. 24, 1919, 8 C.C.A.), 262 Fed. 918, certiorari denied 252 U. S. 578, 40 S. Ct. 344, 64 L. ed. 625, *wherein the mortgage deed of trust, securing the bonds, contained the same*

*3. Section 10968. "Plaintiff as legal representative. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted."

provision as those in the instant case, above quoted, "the trustee in a railroad trust deed was held entitled to a deficiency decree under equity rule 10 (198 Fed. xxi, 115 C.C.A. xxi), where the proceeds of the mortgaged property sold under foreclosure decree were insufficient to pay the mortgage debt, and the trust deed expressly authorized the trustee to collect any deficiency in its own name."

See, also:

Fidelity Philadelphia T. Co. v. *Hale-Kilburn Corp.* (1937), 24 Fed. Supp. 3, at 11.
Hartford Acc. Ins. Co. v. *Southern Pac. Co.*, 273 U. S. 207, 47 S. Ct. 357, at 360.

Petitioner cites the case of *Iowa Title & Loan Co.* v. *Clark Bros., et al.*, 213 Iowa 875, 237 N. W. 336. In that case there were a series of notes secured by the same mortgage and the court held that one or more of the note owners might sue and recover at law and later enforce the mortgage lien, while holders of other notes might in the first instance avail themselves of their remedy by foreclosure. But that is not what the petitioner did in the instant case. Here Phoenix procured a fraudulent deed of trust, securing the bonds, and the claimed considerations thereof, covering every item of property owned by the bridge company, adopting that as its weapon. The case does not hold that a person may have trustees proceed with the foreclosure of a mortgage or deed of trust to recover the claimed debt secured thereby, and having been defeated on the ground that there was no consideration and no debt existed, proceed to sue again on the same pretended indebtedness, nor does it hold that a person may sue on notes and having been defeated on the ground that there was no considera-

tion, that he may then sue in the name of trustees for the foreclosure of a mortgage claimed to secure the same notes.

In *Iowa Title & Loan Co.* v. *Clark,* 215 Iowa 929, 247 N. W. 211, in which under a trust agreement giving to the trustee powers similar to but not as elaborately stated as the powers set forth in the trust deed in this case, the trustee brought one action to foreclose a mortgage as to certain of the notes for which the mortgage was security, and an action at law to recover upon the remaining notes. The Iowa court specifically held that the owners of the notes having constituted the plaintiff their trustee to enforce collection of the debt represented by the notes, and the Iowa law (Section 10968, Codes 1927 and 1931), providing that a trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is prosecuted, the right to prosecute the action on the notes was in the trustee, and stated:

> "Under our statute the plaintiff, as such trustee of an express trust, had authority to bring action against the defendants in its own name without joining with it the beneficial owners of the notes. Aside from its duty as trustee to distribute the proceeds of the trust fund to those entitled thereto, the plaintiff was in no different position than if it were prosecuting this action as the absolute owner of the notes."

Petitioner cites a fraudulent conveyance case, *Clemens* v. *Elder, et al.,* 9 Iowa 272, wherein Elder conveyed lands to James H. Grower and received a bond for the reconveyance of the same upon the payment of $3,750.00 within one year as evidenced by two notes payable to J. H. Grower Bros. & Co., and an action was

brought to set aside this deed as a fraudulent conveyance and it appears that James H. Grower in fact held the title for the firm to which the notes were payable, or their endorsers, or both, none of whom were made parties. The court held the proper parties had not been made defendants. In that case there was no trust deed such as in the instant case authorizing the trustee to represent all parties interested. That case has no similarity in facts to the case at bar and obviously is not an authority for the proposition for which petitioner cites it.

In *Souffront* v. *La Compagnie Des Sucreries, etc.*, 217 U. S. 475, 54 L. ed. 856, 30 S. Ct. 608, 612, this court said:

> "The persons for whose benefit, to the knowledge of the court and of all parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1, 18 L. ed. 129."

See:

Anderson v. *Watt*, 138 U. S. 694, 704, 705, 11 S. Ct. 449, 34 L. ed. 1078.
Robbins v. *Chicago City*, 4 Wall. 657, 71 U. S. 657, 672, 18 L. ed. 427.
Lovejoy v. *Murray*, 3 Wall. 1, 70 U. S. 1, 19, 18 L. ed. 129.

Hoskins v. *Hotel Randolph Co.*, 203 Iowa 1152, 211 N. W. 423, 427.
Fulsom v. *Quaker Oil & Gas Co.* (8 C.C.A.), 35 Fed. (2) 84, 90.
Louisville & Nashville Ry. Co. v. *A. L. Schmidt*, 177 U. S. 230, 20 S. Ct. 620.
Freeman on Judgments (5th Ed.), Vol. 1, sec. 430.

In the case of *Kerrison* v. *Stewart*, 3 Otto 155, it was held:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger *to enforce, or declare void the trust.*"

The court said:

> "In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. * * * The principle which underlies this has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessity of that class of cases, but an old one, long in use in analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities."

In *Mercantile Trust Co.* v. *Schlafly* (C.C.A. 8), 299 Fed. 202, which was a suit by a trustee in bankruptcy against a trustee under a mortgage securing bonds to recover money collected by defendant for interest on bonds within four months prior to bankruptcy, and not disbursed to the bondholders, it was claimed that the

bondholders were necessary parties. The court held that they were not; that they were all represented by the trustee.

In *Beals* v. *Ill. M. & T. R. R. Co.*, 133 U. S. 290, the court said:

> "Upon the facts thus established no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, in which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage, made in the name of another company to secure payment of the bonds, were made parties. *The bondholders were thus fully represented in that suit, and bound by the decree cancelling and annulling the bonds and mortgage.*"

In *Elwell* v. *Fosdick*, 134 U. S. 500, where a decree had been entered and a sale made and confirmed in a suit to foreclose a first mortgage on a railroad, in which the trustee under second mortgage was made a party, and a release of errors in the proceeding executed by such trustee, the court said:

> "The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he bound them by his release of errors."

To the same effect see *Manson* v. *Duncanson*, 166 U. S. 533.

On the issues of fraud, conspiracy, invalidity and want of consideration, Phoenix Finance Corporation, as well as the other bondholders, were represented by the trustees.

In the case of *Richter* v. *Jerome*, 123 U. S. 233, 246, the court said:

> "Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took the bonds; but as all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustees when its interests are not in conflict with theirs, all the equities now asserted were proper subjects for adjudication in the former suit, if they existed. They formed part and parcel of the security which was then foreclosed. * * *"

The Delaware Superior Court (a *nisi prius* court), in its opinion, *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386, cited in petitioner's brief, page 31, overlooked the decision in *Lane* v. *Equitable Trust Company of New York* (8 C.C.A. 262 Fed. 918, certiorari denied, 252 U. S. 578), and the amended rules of this court and the provisions of Sections 10 and 13 of the trust indenture, and misconstrued and failed to follow the decisions of this court.

Point Two and the arguments, citations and quotations from authorities thereunder of petitioner's brief, pages 34, 35, 36, 37, 38 *and* 39, *is a mere copy of petitioner Phoenix' former petition, Point One, pages* 16, 17, 18, 19 *and* 20, *for writ of certiorari, with only a few words changed to give it the appearance of applicability to present petition.*

This was fully answered in respondent's brief on former petition denied by this court. We ask this Honorable Court to take judicial notice of such former petition

and of respondent's brief filed in No. 438, *October Term,* 1938, *entitled Phoenix Finance Corporation, a Delaware corporation, vs. the Iowa-Wisconsin Bridge Company, a Delaware corporation, et al.,* 305 U. S. 650; rehearing denied, 305 (N.S.) 676.

POINT TWO.

The validity of the bonds and the considerations received for them were adjudicated in the foreclosure case, and the decree in that case, affirmed by the Eighth Circuit Court of Appeals, is *res judicata* of the controversies involved in the supplemental and ancillary proceedings.

The argument on this point answers petitioner's argument on its Points 1 and 5, brief pp. 30-34, 44-46.

The application of the doctrine of *res judicata* and determination of what was involved in and adjudicated in the foreclosure case, are governed by the laws of Iowa and the decisions of the courts of Iowa and the federal courts.

Art. 4, Section 1, Constitution of the United States.

Section 905, U. S. Revised Statutes.

Freeman on Judgments (5th Ed.), Vol. 3, Sec. 1386.

Marin v. *Augedahl,* 247 U. S. 142, 62 L. Ed. 1038, 38 S. Ct. 452.

Fauntelroy v. *Lum,* 210 U. S. 230, 52 L. Ed. 1039, 28 S. Ct. 641.

Harding v. *Harding,* 198 U. S. 317, 49 L. Ed. 1086, 25 S. Ct. 679.

Hanley v. *Donoghue,* 116 U. S. 1, 29 L. Ed. 535, 6 S. Ct. 242.

Owsley v. *Central Trust Co.,* 196 Fed. 412.

Carpenter v. *Beal-McDonnell & Co.*, 222 Fed. 453.
Ashby v. *Manley*, 191 Iowa 113, 181 N. W. 869.
Bigelow v. *Old Dominion Copper Mining and Smelting Co.*, 225 U. S. 111, 32 S. Ct. 641-644.
Freeman on Judgments (5th Ed.), Vol. 2, Sec. 1070, pages 3018, 3019.
Pittsburgh C. C. & L. Ry. Co. v. *Long Island L. & Tr. Co.*, 172 U. S. 493, 43 L. Ed. 528, 19 S. Ct. 238.
Thompson v. *Lee County*, 22 Iowa 206.

The question of lack of consideration of the bonds was directly involved in the suit. Every question relating not only to fraud but to consideration was fully tried and fully determined by the court, including the fraudulent procurement of bonds by cancellation of stock. Phoenix participated in the suit and is bound by the determination of the court not only by reason of its being fully represented by the trustees, who brought the action at the instigation of Phoenix and conducted it with counsel of Phoenix selection, but because it was made a party plaintiff and defendant to the petition of intervention, participated in the trial of the action and through the trustees and by itself raised the question of consideration as to the bonds and indebtedness involved in the suits enjoined.

The Circuit Court of Appeals in the first opinion [98 Fed. (2) 416, at 424 (R. 84)] said:

> "The important issue in the case is the question of the sufficiency of the consideration for the $177,000 of bonds issued to Phoenix."

The effect to be given the decree in the foreclosure suit and the identity of the matters alleged in the supple-

mental and ancillary bill with matters adjudicated in the foreclosure action are most clearly set forth in that portion of the opinion of the Circuit Court of Appeals which we attach hereto as an appendix, with appropriate record references (pages 56-67, *infra*).

In addition we present the following:

Under the law of Iowa a judgment on the merits constitutes a complete bar and estoppel between same parties based upon same claim or demand or cause of action not only as to matters in issue, but as to all matters incident to or essentially connected with the subject of the action which might have been put in issue.

Rew v. *School District,* 125 Iowa 28, 98 N. W. 802.

Bagley v. *Bates,* 223 Iowa 836, 273 N. W. 924, at 927.

So. Pacific Ry. Co. v. *U. S.,* 168 U. S. 1, 42 L. ed. 355, 18 S. Ct. 18, 28.

Chicot County Drainage Dist. v. *Baxter State Bank,* 308 U. S. 371, 378, 60 S. Ct. 317.

The doctrine of res judicata does not depend upon affirmance and denial of particular proposition in pleadings of former suit, but upon the fact that proposition has been fully and finally investigated and tried therein and the judgments and orders are res judicata as to all findings or determinations regarding subject matter of suit necessarily implied from final decisions as essential thereto.

King City, Mo., for use and benefit of the United States Cast Iron Pipe & Foundry Co. v. *Southern Surety Co.* (212 Iowa 1230, 238 N. W. 93).

Cromwell v. *County of Sac,* 4 Otto 351, 94 U. S. 351, 532, 24 L. ed. 195.
Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 47 S. Ct. 600.
Reynolds v. *Lyon County,* 121 Iowa 733, 96 N. W. 1069, 1099.

The case of *Reynolds, et al.,* v. *Stockton,* 140 U. S. 254, cited by petitioner, bears no similarity to the instant case. The case is similar to the class of cases where the plaintiff by his notice and pleadings asks for certain relief, and then on default or after answer, without further legal notice and without amendment, takes judgment based on different grounds than those alleged and for a wholly different amount in the absence of the defendant. The court in the opinion states:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. * * * Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings."

The courts are not limited to the pleadings and decree to determine what was adjudicated in a former cause.

State of Oklahoma v. *State of Texas,* 256 U. S. 70, 88, 41 S. Ct. 420, 25 L. ed. 831.
National, etc., Co. v. *Oconto,* 183 U. S. 216, 234, 22 S. Ct. 111, 46 L. ed. 157.
34 Corpus Juris, p. 921, Sec. 1329.
Freeman on Judgments, Vol. 2 (5th Ed.), Sec. 772, p. 1642.

As said in Jones on Mortgages, 8th ed., Sec. 316, at p. 289:

> "A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment. Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie.'"

And in *Carpenter* v. *Longan*, 16 Wall. 271, it is said:

> "Upon bill of foreclosure * * * an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. * * * The note and mortgage are inseparable; the former as essential, the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

See also:

Ariz. Copper Estate v. *Watts*, 237 F. 585.
Holladay v. *Willis*, 101 Va. 274, 43 S. E. 616.
Saunder v. *Dunn*, 175 Mass. 164, 55 N. E. 893.

The proposition finds another analogy in the law of pledges, which is that there can be no valid pledge of property unless there is a valid debt in existence which is to be secured by the pledged property. If there is no such valid debt then the pledge is invalid.

49 C. J. p. 903, Sec. 23 (Failure of Consideration).
Chapman v. *Sipe Springs First Nat. Bank*, 275 S. W. 498 (Tex.).
Stokes v. *Stokes*, 155 N. Y. 581, 50 N. E. 342.

The case of *Thomas* v. *Brownsville, etc. R. Co.,* 109 U. S. 522, is in point. In that case an action was filed for the foreclosure of an indenture of mortgage securing a bond issue. The bonds themselves were issued on account of a contract for the construction of the railroad. The court found as a fact that the bonds were invalid because the construction contract was fraudulent and therefore void. However, some of the bonds were held to be valid to the extent they could be supported by consideration, resulting from work, labor, and material furnished by the contracting company. But the court pointed out that such partial validity of the bonds was not dependent upon the original obligation—the contract which had been declared void.

This case illustrates the fact that in a suit to foreclose a mortgage securing bonds, the court must inquire into the consideration for the bonds and will, if necessary, void the bonds if they are issued without consideration or on account of void obligations but will enter a decree in the amount of consideration found. Necessarily, in the *Thomas case,* the court had to determine the validity of the underlying obligation.

Speers Sand & Clay Works v. *American Trust Co.,* 20 F. (2d) 333.
Geddes v. *Anaconda Mining Co.,* 254 U. S. 599.
Thompson on Corp., pp. 217-218, Sec. 2289.

In *Deaton* v. *Hollingshead,* 225 Iowa 967, 282 N. W. 329, the court, in discussing the nature of a foreclosure action, said:

> "Code, section 12372, provides that a mortgage of real estate shall be foreclosed by equitable proceedings. Plaintiff in the foreclosure suit selected the equity forum for the adjudication of his rights

and prayed, not only for a money judgment, but also for foreclosure of the mortgage and appointment of a receiver. The court of equity had jurisdiction of the controversy and parties, and the action having been properly brought in equity, all issues, *legal* and *equitable,* are triable therein, and the court will determine the entire controversy." (Emphasis supplied.)

Also see *Camp* v. *Boyd,* 229 U. S. 530, 33 S. Ct. 785, at 793.

"A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other." 34 C. J. 853.

Also see:

Chew v. *Brumagen,* 113 Wall. 497, 20 L. Ed. 663.
Johnson v. *Forstall, et al.,* 3 La. Ann. 466 and
Sykes v. *Gerber,* 98 Penn. St. 179.
U. S. v. *California & Oregon Land Co.,* 192 U. S. 355, 24 S. Ct. 266.
Beloit v. *Morgan,* 7 Wall. 619, 19 L. Ed. 205.
Thompson v. *Roberts Bros.,* 24 How. 233.
Kenyon v. *Wilson, The Same,* v. *Baker,* 78 Iowa 408, 43 N. W. 227.
Schroeder v. *Bank,* 144 Iowa 42, 121 N. W. 505.

The Circuit Court of Appeals in that portion of its opinion attached as an appendix (pages 56-67, *infra*) has fully discussed the claims of Phoenix as to the suit for the return of 517 shares of stock.

Petitioner, however, contends in its brief, page 44, that the Delaware Court of Chancery has exclusive jurisdiction to determine the question of return of the stock as being a question of internal management.

Jurisdiction of a foreign corporation having attached by proper service, the question of whether relief relating

to such corporations' internal affairs should be granted, is in no proper sense jurisdictional, but is one of discretion in the exercise of the jurisdiction determined by considerations of convenie ce, expediency, efficacy and justice.

Fletcher Cyc. Corp., (Perm. ed.), Vol. 17, p. 375, Sec. 8427, p. 376.
American Creosote Co. v. *Powell*, 298 Fed. 417, certiorari denied 265 U. S. 595, 68 L. ed. 1198, 44 S. Ct. 638.
Fletcher Cyc. Corp., Vol. 17, Sec. 8429, pp. 385-387.
LaVarre v. *Hall*, 42 Fed. (2) 65.

When a corporation is sued it has a right to defend the suit on all proper grounds.

See Fletcher Cyc. Corp., Vol. 18, Sec. 8672, p. 242.
Burnrite Coal Briquette Co. v. *Riggs, et al.*, 274 U. S. 208, 47 S. Ct. 578.

No question of internal management was presented in the original case and none can be presented now.

To say that the perpetration of a fraud on a corporation by obtaining bonds from it in exchange for shares of stock, is a matter of internal management and that a court dealing with the entire fraudulent conspiracy of which it is but a part, may not deal therewith, is too shocking for consideration.

Petitioner studiously refrains from referring to the findings of fraud with respect to the stock and its petition for the rehearing and modification of decree to have it withheld from adjudication, and the answer thereto that the stock was surrendered as a part of a fraudulent scheme, plan and conspiracy in procuring bonds (F.R. 180-181, 200-201, 223, 398, court's opinion F.R. 413).

POINT THREE.

The injunction is not a violation of Section 265 of the Judicial Code or of the Fifth Amendment to the Constitution.

This point answers petitioner's propositions 3 and 4, pp. 39-43.

The Circuit Court of Appeals, in its opinion, states (R. 782; 115 Fed. (2d) 1, at 10):

> "It is claimed on this appeal that the injunction granted is in violation of Section 265 of the Judicial Code and that it results in a denial of the rights of Phoenix guaranteed by the Fifth Amendment to the Constitution. These contentions may be considered together because unless the decree violates Section 265 it does not deprive Phoenix of any of its constitutional rights."

This court in its opinion in *Local Loan Company* v. *Hunt*, 292 U. S. 234, 54 S. Ct. Rep. 695, 697, stated:

> "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. (Citing authorities.) • • • The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Sec. 265 of the Judicial Code, U.S.C., Title 28, Sec. 379." (Citing authorities.)

The case of *Oklahoma Packing Company* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 S. Ct. 215, 84 L. Ed. 329, cited by petitioner at page 42 of its brief, is not in point. It is not similar to the instant case.

in that it was not an action to preserve the fruits of the previous orders and decrees of a federal court, but was purely and simply a suit to stay proceedings in a state court which originally had jurisdiction of the matter involved.

The opinion in *Guardian Trust Company* v. *Kansas City Southern Railway Company* (C.C.A. 8), 171 Fed. 43, cited by petitioner when read in its entirety is in harmony with the later decisions of that court.

The case of *Toucey* v. *New York Life Ins. Co.* (C.C.A. 8), 102 Fed. (2d) 16, reviews the authorities, and the language of the court in that case is particularly appropriate. In that case it was claimed by the appellant that the jurisdiction of the federal equity court in the equity suit which appellant had brought against the insurance company was grounded upon fraud of the insurance company, and that the claim he made in that suit for recovery upon the disability provisions of his original policy presented merely a dependent legal issue, and that when the court decided against him upon the issue of the fraud, it lost jurisdiction to proceed further or to make determination upon the alleged dependent legal issue. After a complete discussion of the case, the court held that while the claim of appellant for recovery of disability payments was dependent upon his establishing his right to a reinstatement of the policy, which he claimed had been altered and reduced through fraud:

> "But both of those claims were asserted and in controversy before it and the court of equity was called to decide upon both controversies. It did consider the evidence on both issues, and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitable

> controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding upon Mr. Toucey. * * *
>
> "The power and duty of the federal courts to effectuate their decrees and judgments and protect the fruits thereof upon supplemental bills are fully established and exemplified in the following cases, among others" (citing numerous cases).

In view of the decision in the Toucey case and the authorities cited in that and *Hasselberg* v. *Aetna Life Ins. Co.* (8 C.C.A.), 102 Fed. (2) 23, in which the leading authorities are fully reviewed, there can be no question as to appellee's right to injunctive relief.

Some of the principal cases upholding the right of the court to act under similar circumstances are:

Root v. *Woolworth,* 150 U. S. 401, 14 S. Ct. 136.
Hickey v. *Johnson* (C.C.A. 8), 9 Fed. (2d) 498, reviewing all authorities to that date.
Swift v. *Black Panther* (C.C.A. 8), 244 Fed. 20.
Phipps v. *C. R. I. & P. Ry.* (C.C.A. 8), 284 Fed. 945.
Nilson v. *Alexander* (C.C.A. 5), 276 Fed. 875.

In the last cited case it is specifically held, although there should be no question as to the proposition, that the right to plead the decree of the federal court in the state court is no reason why resort should not be had to the equitable jurisdiction of the federal court.

In petitioner's brief, at page 42, it is stated that none of the exceptions stated in *Equitable Life Assr. Society* v. *Wert* (8 C.C.A.), 102 Fed. (2) 10-14, are applicable to the facts here. The court there said:

"The several classes of cases in which such injunctions may be granted consistently with the provisions of Sec. 265 may be roughly classified as follows: * * *.

"3. Proceedings *in personam* in a state court, when the federal court has acquired jurisdiction of a suit *in personam* involving the same subject-matter, based upon some well recognized equitable ground, and where the effect of the state court proceedings would necessarily be to defeat or impair the jurisdiction of the federal court" (citing cases). * * *. "An inadequacy of legal remedy exists where one is bound to litigate a multiplicity of suits having a community of facts and issues" (citing cases). "Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts" (citing cases).

In the instant case, after the rendition of the decision of the Eighth Circuit Court of Appeals on the 8th day of August, 1938, Phoenix, although filing a petition for writ of certiorari in this court, commenced the filing of various suits in Delaware to have retried piece-meal the various matters which had been determined in the foreclosure proceeding, one after the other.

The respondent filed the supplemental and ancillary bill herein on the 18th day of September, 1939, and on the 28th day of September, 1939, hearing was had on motion for temporary writ of injunction, Phoenix appearing by its attorney, and such temporary injunction was granted (R. 118, 132-140). To re-try the matters which were disposed of in the foreclosure action in the various suits in Delaware and to defend those actions in trial and appellate courts would obviously require respondent

to litigate a multiplicity of suits and impose upon it a tremendous expense.

This cause on supplemental and ancillary bill was heard and submitted on the 11th day of March, 1940, Phoenix appearing by its attorney at such hearing (R. 257-293). No opinion was filed in the one Delaware case tried until March 18, 1940. (See 14 Atl. (2) 386.)

By the terms of the decree Phoenix is required to dismiss all the Delaware cases at its own cost (R. 722). By the terms of the supersedeas bond filed after appeal to the Circuit Court of Appeals, it is not required to dismiss any of the pending suits immediately, but is to satisfy any judgment theretofore entered by any state court in Delaware, or which might thereafter be entered in violation of the final decree entered on the supplemental complaint in case of the affirmance of the final decree by the Circuit Court of Appeals or Supreme Court of the United States in case of certiorari.

POINT FOUR.

The burden was not upon the respondent to show that the decree in the foreclosure case was a "right" one and not obtained by fraud.

This point answers petitioner's argument on its Points 6, 7 and 8, brief, pages 46 to 55.

Petitioner opens its argument on this proposition by stating that the supplemental and ancillary bill seeks to enjoin Phoenix from asserting "bona fide" claims and that these claims are a part of a general account set out by an exhibit rejected by the court.

A similar report was attached to the exceptions by Phoenix to the master's report (F.R. Supp. 22, 23). In

its petition for rehearing Phoenix claimed advances of a different amount by a similar report of the same accountants (F.R. 308-324). These claims were effectually disposed of both by the district court (F.R. 176-177) and by the Circuit Court of Appeals (R. 88, 89, 98 Fed. (2) 416, at 426) as being wholly without foundation.

Phoenix having committed the most aggravated fraud against the bridge company, and having put the bridge company to enormous expense extricating itself from such situation, now having granted itself absolution from its fraudulent conduct, presumes to come back to the same court to assert that it is there with clean hands and that its victim is the one whose hands are unclean, and that therefore this case ought to be retried.

As stated by the court below, in discussing the cases cited by petitioner: "These authorities fall far short of supporting the contention of Phoenix. They place no such burden upon the victim of a wrongdoer when he attempts to secure the fruits of a former judgment against such wrongdoer. * * * The rule is applied generally for the protection of innocent parties and not for the benefit of parties whose hands were found to be unclean in the first suit." (R. 783; 115 Fed. (2) 1, at 10-11.)

Most of the cases cited in the brief of Phoenix are cited in 34 Corpus Juris 779, Section 1198, under the heading "Judgments by Consent," Note 9, among which is *Lawrence Mfg. Co.* v. *Janesville Cotton Mills Co.*, 138 U. S. 552, containing the language: "The prior decree was the consequence of consent, and not of the judgment or decree, and, this being so, the court had the right to decline to treat it as *res adjudicata.*"

The case of *Union Central Life Insurance Co.* v. *Drake* (8 C.C.A.), 214 Fed. 536, is not similar. That was a second and independent suit and not an ancillary bill to preserve the fruits of the original decree. The court held that when the second suit is upon a different cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter, as to each question which was or might have been presented and determined in the former.

"Lord Resdale's Rule" is applicable only in cases where a party is seeking to modify or enlarge an incomplete decree and then to enforce it. (See cases cited by court below, 115 Fed. (2) 1, at 11, R. 783-787.)

As stated in *Utah Power & Light Co.* v. *U. S.* (Court of Claims), 42 Fed. (2) 304, at 308:

> "In *Lawrence Mfg. Co.* v. *Janesville Mills,* 138 U. S. 552, 11 S. Ct. 402, 405, 34 L. ed. 1005, the plaintiff sought to have a former consent decree extended and then enforced and the court said:
>
> "'But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill.'
>
> "Accordingly, the court held that it was at liberty to inquire whether circumstances justified the relief asked, and, the former decree having been entered by consent, the court had the right to decline to treat it as *res adjudicata. But in the case at bar no modification of the former decree is sought, the plaintiff stands on the decree as it is, and the case is not one in which a new trial of the former action can be had."* (Emphasis supplied.)

Petitioner claims that the scope of the decree is exceedingly narrow. The rule is well settled that "what was involved and determined in the former suit is to be tested by an examination of the record and proceedings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court." *State of Oklahoma* v. *State of Texas*, 256 U. S. 70, at 88, 41 S. Ct. 420, at 423.

Petitioner's assertion that the mortgage held fraudulent was an "open" mortgage securing a total obligation of $59,000 is wholly without merit. The pretended mortgage was adjudicated fraudulent and wholly without consideration. The $9,000 item was asserted in the trial as an alleged additional consideration for $97,000 in bonds. The mortgage having its inception in fraud was a dead instrument from the day of its execution, and was so found by the court, and petitioner cannot now infuse it with life.

The record in this case shows that the court specifically found that the $50,000 mortgage was without consideration, fraudulent and void (F.R. 191-192). Phoenix asked that the decree be modified so as to withhold from adjudication the question of validity of said mortgage (F.R. 223), which motion was denied, and Phoenix assigned as error on the original appeal the findings of the court as to the $50,000 mortgage (F.R. 511), as further error the court's denial of the petition that the decree be modified so as to withhold from adjudication such mortgage (F.R. 526), and as further error the court's failure to adjudge and decree that all of the bonds issued to Phoenix Finance System, Inc. (which included the bonds issued for the purported consideration of the mortgage) were valid (F.R. 526).

Under the circumstances there can be no question that the mortgage was fully disposed of by the decree. Petitioner now seeks to assert that the note for $50,000 was not an exhibit in the foreclosure cause, and that because the present decree directs Phoenix to deliver up for cancellation that note, there is necessarily an enlargement and "piecing out" of the original decree. As stated by the court below in that portion of the opinion printed as an appendix: "It is not claimed that there was a different consideration for the note than the consideration for the mortgage, which was held to be fraudulent and non-existent. There can be no merit in such a contention. The entire transaction was decreed to be fraudulent and without consideration. The decree is conclusive."

In connection with this claim, the following language from *Toucey* v. *New York Life Insurance Co.* (8 C.C.A.), 102 Fed. (2) 16, at 20), is most appropriate:

> "The federal court had heard the evidence and determined that Mr. Toucey has no rightful claim against the insurance company on account of the life insurance policy which he had sought to have reinstated and the court's final decree to that effect had been duly entered. *If any necessity had been anticipated the federal court would doubtless have gone through the formality coincident with the decree of ordering Mr. Toucey to bring the policy into court for physical destruction* by the marshal and would have admonished Mr. Toucey by appropriate writ or order to assert no claims under it" (emphasis supplied).

So the court would, if any necessity had been anticipated, have gone through the formality of having the note and mortgage brought into court and delivered up for cancellation.

Petitioner urges that there was no issue in the foreclosure cause as to the right of Phoenix to recover the 517 shares of bridge company's stock delivered to the bridge company in exchange for bonds. This statement is erroneous and not supported by the record.

The petition of intervention as amended, alleged in substance that John A. Thompson and others of Phoenix Finance System, Inc., acting in concert and as parties of a common scheme, plan and conspiracy to cheat and defraud the defendant corporation and its stockholders, and with intent to cheat and defraud said defendant corporation and its stockholders while controlling the board of directors of the defendant corporation, so manipulated the affairs of said company as to issue and deliver to Phoenix Finance System, Inc., $60,500 of bonds in exchange for 517 shares of its preferred stock. That in such transaction the parties of said plan and scheme, owning and controlling Phoenix Finance System, Inc., and controlling the defendant corporation, acted for the defendant corporation in a matter in which the interests of said corporations were adverse.

Phoenix in its answer denied the allegations of the petition of intervention and placed them in issue and prayed for general equitable relief (F.R. pp. 91-92). The trustees filed a reply denying the allegations of the petition of intervention (F.R. 102-103). The order of reference directed the master to report "whether the evidence and the pleadings entitled complainants or the other parties herein to the relief, or any part thereof, prayed in their respective pleadings" (F.R. p. 108).

The master found that the exchange of stock for bonds was done in carrying out a fraudulent conspiracy and that the transaction was fraudulent, *ultra vires*, il-

legal and void. (Master's findings 5, 6, and 7; F.R. pp. 129-130; 136-137).

The court made findings that the stock was surrendered and cancelled at the time Phoenix fraudulently procured the bonds and found that it was done as a part of a fraudulent conspiracy to acquire the ownership of the bridge, to the exclusion of the bridge company and its other stockholders. (F.R. p. 180, Findings 6 and 7; F.R. pp. 196-199, Findings 35, 36, 37; F.R. pp. 200, 201. Finding 39. See court's opinion, F.R. p. 157.) The court in its decree did not direct that the stock be returned to Phoenix (F.R. pp. 202-204).

Phoenix, recognizing that the issue as to the right to return of the stock had been adjudicated, filed its petition for rehearing and modification of decree and in it asserted: "As further ground for the relief herein prayed, Phoenix Finance Corporation shows to the court that through inadvertence, oversight or misapprehension of the facts in this case, the court invalidated $60,500 of bridge company bonds held by Phoenix Finance Corporation for which the last named company surrendered to the bridge company 517 shares of its capital stock, which was the admitted property of Phoenix at the time, and the court has wholly failed to reinvest Phoenix with this stock, but, on the contrary, has not alone invalidated the bonds but deprived Phoenix of the capital stock which it surrendered therefor" (F.R. p. 222). And prayed, among other things:

> "Third. In case rehearing is denied, the decree be so modified as to reinvest in petitioner 517 shares of 'A' stock surrendered in exchange for bonds" (F.R. p. 223).

The allegations and prayer of the petition for rehearing and modification of decree were placed in issue by the answer of defendant and interveners thereto, alleging that "the 517 shares of capital stock surrendered to the bridge company were so turned over as a part of the fraudulent scheme, plan and conspiracy and to fraudulently procure from the bridge company $60,500 of bonds fraudulently issued, and that such transactions were but part and parcel of the fraudulent scheme, plan and conspiracy, and that the complainants are not entitled to have the * * * stock returned. That money or property used to perpetrate a fraud cannot be recovered" (F.R. p. 398).

The trial court denied this petition, finding that the stock had been used as an instrumentality of fraud (F. R. p. 413).

Phoenix on appeal to the Circuit Court of Appeals, by its assignment of errors again presented the question of its right to said stock. (Assignments of error 10, 44, F.R. pp. 510, 522, 523, and especially assignment 62, p. 527.)

The Circuit Court of Appeals overruled such assignments and held that Phoenix was not entitled to the return of the stock. (98 Fed. (2) 416 at 428; F.R. Vol. VI, p. 1707.)

The Delaware case is in chancery and in it Phoenix asks for the same thing, the reissuance of said 517 shares of stock, based on the same identical transaction which was before the federal court when such relief was denied. There was only one transaction in which the bridge company issued $60,500 of bonds in connection with the cancellation of 517 shares of stock, and that is

the one which was involved in this case as a part of the fradulent conspiracy and the one in which the stock was cancelled while Phoenix was fraudulently obtaining the bonds. That matter has been fully determined by the trial court and the Circuit Court of Appeals. (Exhibit SC-2, R. pp. 301-307; trial court's opinion F. R. pp. 156-179; court's findings, F.R. pp. 180-202; Court's opinion, F.R. pp. 411-413; F.R. pp. 981, 982; F.R. bottom p. 541.)

U. S. v. *California and O. Land Co.*, 192 U. S. 355, 24 S. Ct. 266.

A final joinder by issue is not always essential, nor does it matter that the question decided in the prior case was purely one of law, nor that the decision was upon a motion or demurrer provided the issues were involved and were decided and that the order or decision of the court was final. *Spencer* v. *Watkins* (C.C.A. 8), 169 Fed. 379, cert. denied 215 U. S. 605.

Phoenix' allegations of alleged counterclaim were properly stricken. It was merely an attempt to plead claims on its part that had been held by the decree to be non-existent. *Ashby* v. *Manley*, 191 Iowa 113, 116, 181 N. W. 869, 871.

Petitioner's claim of fraud has been fully discussed in the statement of facts (pages 19-21, *supra*).

See *Graves* v. *Graves*, 132 Iowa 199, 204, 109 N. W. 707; *Abell* v. *Partello*, 202 Iowa 1236, 211 N. W. 868.

In *Southern Pacific R. Co., et al.* v. *U. S.*, 168 U. S. 1, 18 S. Ct. 18, 27, the court said:

> "Whatever is new in the evidence now before us touching that matter, is simply cumulative on the

one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rules of *res adjudicata.*"

Also see:

U. S. v. *Throckmorton,* 8 Otto 61-71, 25 L. ed. 93.

Deposit Bank of Frankfort v. *Board of Councilmen of the City of Frankfort,* 191 U. S. 499, 24 S. Ct. 154, at 159.

Rew v. *School District,* 125 Iowa 28, 98 N. W. 802.

King City, etc. v. *Southern Surety Co.,* 212 Iowa 1230, 238 N. W. 93.

Conclusion.

The facts of the identity of the matters involved in the Delaware actions and of the mortgage with those involved in the original determination of this cause have been found by the District Court, and such findings on appeal affirmed by the Circuit Court of Appeals.

The case was carefully reviewed by the Circuit Court of Appeals. The decision does not conflict with the decisions of another Circuit Court of Appeals. It is in conformity with the local decisions of the Iowa Supreme Court and with the decisions of this court. The questions presented have been previously determined by this Honorable Court and the petition presents no question of general importance. There has been no departure from the ac-

cepted and usual course of judicial procedure which calls for an exercise of this court's power of supervision.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

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APPENDIX.

That portion of the opinion below as to the effect to be given the decree in the foreclosure suit, and setting out matters involved in supplemental and ancillary proceedings, with appropriate record references.

"2. The dispute next turns upon the effect to be given the decree in the foreclosure suit. In considering this issue it should be observed that it has long been the rule in the national courts 'that a former judgment between the same parties (or their privies) upon the same cause of action as that stated in the second case constitutes an absolute bar to the prosecution of the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Werlein* v. *New Orleans*, 177 U. S. 390, 397; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 309 U. S. 371, 378; *Davis* v. *Brown*, 94 U. S. 423. It is only when a suit is upon a different cause of action, but between the same parties, 'that a judgment in the former action operates as an estoppel in the latter only as to every point and question which was actually litigated and determined and is not conclusive as to other matters which might have been, but were not litigated or decided. *Union Central Life Ins. Co.* v. *Drake*, 8 Cir., 214 F. 536-542; *Cromwell* v. *County of Sac*, 94 U. S. 351. These rules have been consistently followed by this court. See *Handlan* v. *Walker*, 8 Cir., 200 F. 566, 568; *Dickinson* v. *Orr*, 8 Cir., 94 F. (2d) 536, 539; *Guettel* v. *United States*, 8 Cir., 95 F. (2d) 293; *Badger Dome Oil Co.* v. *Hallam*, 8 Cir., 99 F. (2d) 293, 296; *George H. Lee* v. *Federal Trade Commission*, 8 Cir., 113 F. (2d) 583, 585.

In this case the parties are the same. The only question relates to whether the matters and things litigated are the same. In the case of *Toucey* v. *New York Life Insurance Co.*, 8 Cir., 102 F. (2d) 16, 20, we said: 'But although the methods of presenting and determining controversies and the facts on which they arise may sometimes differ in equity and in law, so long as the identity of the controversies can be discerned, the adjudication in one court concludes them.' And in *Union Central Life Ins. Co.* v. *Drake, supra,* this court said, 'The true test of the identity of causes of action is the identity of the facts essential to maintain them.'

It is necessary, therefore, to define the issues tried and determined in the foreclosure suit in order to determine whether the controversies pleaded in the supplemental and ancillary bill can be identified with the controversies adjudicated in the foreclosure decree.

It is urged that in a foreclosure suit the validity of the trust deed only is in issue and the validity of the bonds and the consideration given for them, or the question of fraud inhering in them, are to be determined in a subsequent proceeding. The short answer is that the trustees and Phoenix as well as the bridge company elected to litigate all these matters in the foreclosure proceedings, and having done so all parties are bound by the scope of that decree.

It is well settled that in the foreclosure of a mortgage or deed of trust two issues are usually tendered by the plaintiff. First he asks for the foreclosure of the mortgage lien and the sale of the security and, second, he asks to have the amount of the secured debt established and for a deficiency judgment. The first is an equitable issue and the second a legal one, but the

court of equity having taken jurisdiction determines them both. In the foreclosure suit here involved the trustees, acting under the authority expressly conferred upon them by the trust deed (F.R. 41-44), selected a court of equity and therein demanded both remedies (F.R. 10-11). The answer (F.R. 62-66) and the petition of intervention (F.R. 73-83, 100-102) traversed both issues, alleging as to both the trust deed and the bonds that they were fraudulently issued. The petition of intervention was more specific and pointed out the nature of the fraud. It alleged that Phoenix and the bridge company were dominated and controlled by the same officers; that those common officers in violation of their fiduciary duties to the bridge company fraudulently issued the trust deed and the bonds to themselves or to corporations controlled by them for the purpose in brief of fraudulently obtaining ownership of the bridge company's property without consideration. Phoenix denied these allegations (F.R. 91-92).

Upon the issues thus joined the burden was on the interveners and the bridge company to show such domination and common control. This having been done the burden then rested upon Phoenix, holder of the bonds, and the trustees to show entire fairness in the transaction, including a fair consideration for the bonds. *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 599. It was upon these issues that the case was tried, and Phoenix, as owner of nearly all the bonds, and its officers and attorneys took an active part. (F.R. 531, 238-564, 633-692; F.R. Supp. 14-58; F.R. 204-205, 206-291.) Had they been able in that suit to show that a fair consideration had been paid for the bonds and that the bridge company had had the benefit of such considera-

tion all other elements of fraud would have been comparatively trivial. As said in the opinion of this court on the appeal in the foreclosure suit, 'The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix' (R. 84). A mass of evidence was introduced upon that issue, and the court found against Phoenix, declared its bonds invalid and without consideration, and denied foreclosure. In our opinion on the first appeal (R. 83-84) we summarized the consideration claimed by Phoenix and the trustees to have been paid for the bonds as follows, and it will be found convenient for reference in considering the issue of res judicata here:

To Phoenix in consideration of		
1. In exchange for its mortgage dated March 10, 1931	$50,000.00	
Principal of mortgage	3,548.56	
Accrued interest		
Allowance to give 6% yield on bonds	12,727.31	
		$ 66,275.87
2. For advancements under guaranty contract of November 10, 1930,		
To Industrial Contracting Co.	10,000.00	
To McClintic-Marshall Co.	11,262.71	
		21,262.71
3. Paid Kramer & Hogg to discharge mechanic's lien		9,000.00
4. Cash		461.42

5. In exchange for 517 shares of bridge company stock with accrued interest		60,500.00
6. As security for		
Payment of taxes	3,125.00	
Advancements	14,610.19	
	17,735.19	20,100.00
To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	15,000.00	200,000.00

(Exhibits B-27 and B-28 (H.E.B.) F.R. 827-829; offered F.R. 562; F.R. 541-542; 979-982; F.R. Supp. 27, 48-51.)

With the foregoing rules and the situation described in mind we turn to the controversies alleged in the supplemental and ancillary bill to determine whether or not they may be identified with the facts which were or which might have been adjudicated in the foreclosure decree.

(a) In the supplemental and ancillary bill it is charged (R. 5-6), and the answer admits (R. 148), that in Sept., 1938, Phoenix filed an action in Superior Court of Delaware against the bridge company in which the alleged cause of action is based upon two promissory notes, one for $2,000.00 dated December 15, 1932, and one for $3,125.00 dated January 20, 1933 (Ex. SC-1, R. 294-301, especially 298-299; offered R. 266); and the bridge company claims that these notes were involved in and were adjudicated in the foreclosure suit.

The record in the foreclosure suit shows that the $2,000.00 note was a part of the sum of $14,610.19 designated as 'Advancements' in item 6 of the foregoing summary, and that the $3,125.00 note is the same as the first entry of item 6, referred to as 'payment of taxes.' For the total alleged indebtedness under item 6 in the amount of $17,735.19 bonds in the sum of $20,100.00 were issued to Phoenix (F.R. Supp. 48-51). All the claims included in item 6 were considered in the master's report (F.R. 133-134) to which exceptions were filed by Phoenix (F.R. Supp. 14-58), the bridge company and the interveners (F.R. 150-155). The court considered all the exceptions filed by all the parties (F. R. 164-179) and decreed 'that all bonds are without consideration, except the bonds aggregating $15,000.00 referred to hereafter' (F.R. 203-204).

Phoenix contends that the decree is wrong with respect to these items, that the record shows that the sums of $3,125.00 and $2,000 were actually advanced to the bridge company, and that the court without the pleading of a counterclaim or off-set balanced against them $14,000 which Phoenix owed the bridge company for stock fraudulently issued to and held by Phoenix. The claims urged here were all asserted in the foreclosure suit without avail and upon appeal to this court the decree was affirmed. The merits of that controversy can not be reexamined in this collateral attack upon the decree. *Root* v. *Woolworth,* 150 U. S. 401, 414. The adjudication is final and conclusive.

A similar contention was presented to this court in the case of *Thornton* v. *Carter,* 8 Cir. 109 F. (2d) 316, and we there said, at page 320 of the report, citing numerous authorities, that "If a judgment or decree of this

court which disposes of a case on the merits has become final, no purpose can be served by considering whether it is right or wrong. A judgment which is wrong, but unreversed, is as effective as a judgment which is right." In *Cooper* v. *Reynolds*, 10 Wall. 308, 77 U. S. 308, the Supreme Court said: "It is of no avail—to show that there are errors in the record (in a former suit), unless they be such as to prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle * * * takes rank as an action of the law." See also *Manson* v. *Duncanson*, 166 U. S. 533, 547.

(b) It is next charged (R. 6) that in February, 1939, Phoenix commenced a suit against the bridge company in the Court of Chancery of Delaware seeking to recover 517 shares of stock of the bridge company which were surrendered and cancelled at the time Phoenix fraudulently procured the issuance to it of $60,500 of bonds (referred to as item 5 in the foregoing summary), which shares the court in the foreclosure suit found and decreed Phoenix was not entitled to have reissued to it (Ex. S. C. 2, R. 301-307, offered R. 267). Phoenix admits the commencement of such a suit but contends that there was no issue in the foreclosure suit as to the right of Phoenix to get back the 517 shares of stock (R. 149).

In the foreclosure suit it was found that the entire transaction involving the exchange of 517 shares of stock for bonds was fraudulent (F.R. 180-181, 201). After the decree in that case was rendered Phoenix filed a petition for rehearing and modification of the decree in which it prayed that the decree be so modified as to reinvest in it the 517 shares of stock (F.R. 223). (See F.R. 398.) The

court denied the petition (F.R. 411-413), and this court affirmed (R. 91-93).

In the opinion of this court (98 F. (2d) at p. 428, R. 92), we said with reference to this matter, 'In refusing to modify the decree to require the bridge company to return to Phoenix 517 shares of stock surrendered in exchange for bonds the court invoked the maxim that "He who hath done iniquity shall not have equity." * * * In the present case the district court adopted the view that all of the transactions leading up to the issuance of the bonds were steps in a single fraudulent enterprise to obtain ownership of the bridge after a foreclosure, * * * Having determined that the appellants had no standing to maintain their suit, the district court had neither the right nor the duty to compel the bridge company to restore what it had received from the bondholders. This is not a case in which the defrauded party is suing to rescind. Here the fraud had been pleaded only as a defense. * * * when the wrongdoer as plaintiff is attempting to enforce the tainted contract he is turned out of court empty handed.' Citing authorities.

The question for determination is whether the denial of a restoration under the 'clean hands doctrine' by a court having jurisdiction is *res judicata* or whether the wrongdoer may in a separate suit go into another court and recover the property used by him in perpetrating the fraud denounced by the court which denied restoration. If he may do so it would seem that the clean hands doctrine is only a bother, putting litigants to such useless trouble and expense. No authority has been cited to sustain such a practice. In *Root* v. *Woolworth, supra,* the Supreme Court said, 'The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunc-

tions or writs of assistance in order to void the relitigation of questions once settled between the same parties is well settled.' One who fraudulently procures a conveyance may not defeat the defrauded grantor, nor protect himself from the consequences of his fraud, by bringing a suit for restoration in another jurisdiction from the one in which his fraud was adjudged. He is concluded by the first judgment. *Independent Coal & Coke Co.* v. *U. S.*, 274 U. S. 640.

(c) In June, 1939, Phoenix brought another action in the Superior Court of Delaware against the bridge company upon a promissory note for $500.00 and another note for $12,110.19, and also upon two claims, one for $15,000.00 and one for $7,000.00 (R. 6-7, 98; Ex. S. C. 3, R. 307-319, especially 316-317; offered R. 267). The two notes formed part of the alleged consideration for the issuance of $20,100.00 of bonds, referred to in item six of the foregoing summary (F.R. Supp. 48-51). They are governed by the considerations discussed in paragraph (a) above. The claim for $15,000 is a mere restatement of the claim on the notes in different form and in the alternative. The claim for $7000 is a claim for interest on the notes (R. 149). All these claims are sufficiently identified with the controversy adjudged in the foreclosure suit. The decree in that suit concludes them all.

(d) In June, 1939, Phoenix brought another suit against the bridge company in the Superior Court of Delaware for $21,262.71, based upon a guaranty agreement dated November 10, 1930. (R. 7, 98-99; 149-150, Ex. S. C. 4, R. 320-339, especially 336-338; offered R. 267.) This claim is scheduled under item 2 in the foregoing summary. It is made up of the same items. They were

considered in the foreclosure suit and the court found the guaranty agreement to be without consideration, fraudulent and void. The court found that the claimed advancement for the bridge company had not been made by Phoenix. (F.R. 189-191, 192, 193, 194, 196, 201-202, 1393-1395.) Clearly, these claims were litigated in the foreclosure suit, and that judgment is conclusive upon the parties.

(e) Another suit in the Delaware court brought by Phoenix against the bridge company is based upon two bonds of the face value of $500.00 each (R. 7-99). It is admitted that these bonds are a part of those issued to Anderson (referred to in the foregoing summary) in the total amount of $7,400.00 for a debt of $6,000.00 (R. 150). The court below in the foreclosure suit found that they were valid to the extent of the consideration paid for them by Anderson and invalid for in excess of that amount. Payment of the amount found to be due was ordered (F.R. 204).

The issuance of these bonds was a part of the entire fraudulent scheme to which the officers of Phoenix were parties. They can be paid only in the manner provided in the decree in the foreclosure suit. Equity will follow them until they come into the hands of an innocent purchaser for value. Even then the wrongdoer could not acquire them free from the obligation imposed upon them by the court. Phoenix having been a party to the fraud cannot be an innocent purchaser for value no matter when it acquired title. *Independent Coal & Coke Co.* v. *United States, supra,* at page 647. The adjudication is binding upon it.

(f) Item 1 of the foregoing summary shows that upon the trial of the foreclosure suit Phoenix accounted for $66,275.87 of the consideration claimed to have been given for the bonds of the bridge company issued to it by an exchange of bonds for a mortgage on the property of the bridge company dated March 10, 1931, in the principal amount of $50,000.00 and accrued interest and allowance to give an 8% yield on the bonds.

After hearing and considering the evidence in respect to this mortgage the court below in the foreclosure suit found that it was fraudulently issued: 'That in truth and in fact no indebtedness of said bridge company to Phoenix Finance System, Inc., existed and the bridge company received no consideration for the execution of said mortgage; that the same was and is wholly without consideration fraudulent and void. At said time (March 10, 1931), said Thompson caused entries to be made on the books of said bridge company purporting to show receipt of $50,000 in cash, whereas, in truth and in fact, said amount and no part thereof was received by the bridge company' (F.R. 191-192). (See also F.R. 181, 201-202.)

In its petition for a rehearing or in the alternative for a modification of the decree, Phoenix prayed 'that the decree be modified so as to withhold from adjudication the question of the validity of the $50,000 mortgage given by the bridge company to petitioner, reserving the right to petitioner to litigate said mortgage in another action, if it so desires' (F.R. 223). The petition was denied (F.R. 411-413) and this court affirmed (R. 91-92).

In the supplemental and ancillary bill the bridge company alleges that in 1939 Phoenix caused this mortgage to be recorded, thereby wrongfully causing said

mortgage to cast a cloud upon the title to its property; and it prayed that Phoenix be required to surrender the original mortgage and any purported notes secured thereby (R. 10-11). The prayer was granted (R. 721-722).

Phoenix would relitigate the validity of this mortgage. Its position is that the $50,000 note secured by the mortgage was not introduced in evidence in the foreclosure suit nor was it in issue and, therefore, was not adjudicated. It is not claimed that there was a different consideration for the note than the consideration for the mortgage, which was held to be fraudulent and non-existent. There can be no merit in such a contention. The entire transaction was decreed to be fraudulent and without consideration. The decree is conclusive. "A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other." 34 C. J. 853.

In this proceeding the court further found that Phoenix is threatening to prosecute further actions in the courts of Delaware against the bridge company on causes of action based upon the alleged consideration for the bonds involved in the foreclosure suit; and the decree enjoined Phoenix, its officers, agents, servants, employees and attorneys from commencing or carrying forward any suits or causes of action involved in or determined in the findings of fact and conclusions and decree dated December 1, 1936 (in the foreclosure suit), and order denying petition for rehearing and modification of decree filed March 4, 1937 (R. 722).

The decree was proper and necessary to secure to the bridge company the full benefit of the decree and orders in the foreclosure suit."